89-526

Supreme Court, U.S.
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NO:

# In the Supreme Court of the United States

OCTOBER TERM, 1989

GLADYS RIVERA del SOCORRO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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35 pp

## QUESTIONS PRESENTED

I. WHETHER EVIDENCE THAT A DEFENDANT AIDED AND ABETTED A CO-DEFENDANT IN SELLING CONTROLLED SUBSTANCES IS LEGALLY SUFFICIENT BY ITSELF TO SUSTAIN A CONVICTION FOR POSSESSION WITH INTENT TO DISTRIBUTE CONTROLLED SUBSTANCES?

II. WHETHER EVIDENCE OF A DEFENDANT'S PRESENCE DURING NEGOTIATIONS FOR A NARCOTICS TRANSACTION AND THE SEIZURE OF NARCOTICS, ASSOCIATION WITH CONSPIRATORS, AND KNOWLEDGE OF THE OBJECTIVES OF A CONSPIRACY ARE LEGALLY SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION FOR CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE COCAINE?

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## OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is unpublished. It is reproduced in the Appendix (hereinafter "A") at page 1.

## JURISDICTION

The judgment to be reviewed was entered on July 25, 1989. A-1. Jurisdiction is conferred on this Court by Title 28 U.S.C. section 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .."

## STATEMENT OF THE CASE

### A. Trial Proceedings

Mrs. Rivera was indicted in the Southern District of Florida, Miami

Division, for conspiring to possess with intent to distribute, and possessing with intent to distribute, cocaine. After pleading not guilty, Mrs. Rivera was tried by a jury. At the close of both the government's case and all of the evidence, Mrs. Rivera moved for judgments of acquittal on both counts. The district court denied these motions. The jury found Mrs. Rivera guilty on both counts. The district court entered its judgment of conviction and sentenced Mrs. Rivera to two concurrent prison terms of eleven years and a five year term of supervised release.

Mrs. Rivera timely appealed her judgment of conviction and sentence. On July 25, 1989, the United States Court of Appeals for the Eleventh Circuit affirmed Mrs. Rivera's conviction without opinion. A-1.

## B. Facts

On April 6, 1988, following an introduction by a confidential informant, undercover DEA agent Forteza met with Mrs. Rivera's co-defendant Maria Cardona for the purpose of selling ten kilograms of cocaine. After a brief discussion, Forteza offered to buy twenty kilograms of cocaine from Cardona. The two exchanged beeper numbers and Cardona agreed to contact agent Forteza when she could obtain the cocaine.

On April 11, 1988, Cardona contacted agent Forteza and advised him she was ready to do business. The two agreed to meet at La Carreta Restaurant at noon. Forteza went to the restaurant as planned. Co-defendant Cardona was present with Mrs. Rivera. Cardona introduced Mrs. Rivera and then discussed a sale of five kilograms of cocaine with Forteza. Forteza had never heard of Mrs. Rivera prior to their

introduction and had no idea she would be at the meeting. Mrs. Rivera did not participate in co-defendant Cardona's negotiations with Forteza.

Following these initial negotiations, co-defendant Cardona placed a telephone call to the supplier and gave him directions concerning the place and amount of delivery. At this time, Forteza engaged Mrs. Rivera in conversation and elicited that she knew the person with whom Cardona was speaking and that he would be supplying Forteza's cocaine. Mrs. Rivera also spoke briefly on the telephone, repeating the information co-defendant Cardona had already imparted to the person Cardona called. She relayed a message to Forteza that the supplier was unable to state when he could deliver the cocaine. Forteza then took the phone and told the supplier how much cocaine he wanted and where it should

be delivered. Co-defendant Cardona took the telephone back and concluded the conversation with the supplier. She then explained to Forteza that some of the kilograms of cocaine were repackaged but still had very good quality. In response to Forteza's inquiry, Mrs. Rivera stated that the cocaine had been received like that.

Later that afternoon, Cardona beeped Forteza. She set the time and confirmed the place of delivery. She advised Forteza that the supplier would bring the cocaine in a white van. She requested that Forteza be there on time.

At the designated time and place, Forteza observed a white van arrive. Forteza went to the driver and determined he was the supplier. The supplier, co-defendant Nicolas Temino, exited the van, walked to the rear, and opened up the

doors, exposing several plastic bags containing kilogram packages of cocaine. Forteza advised that he wanted five; Temino acknowledged that he knew. Temino assembled the five kilograms and told Forteza this was his cocaine. Forteza then gave a prearranged arrest signal and surveillance agents moved in and arrested Temino. A search of the van revealed the presence of the five kilograms of cocaine intended for Forteza and an additional five kilograms of cocaine.

Based on a telephone number that was attributed to co-defendant Cardona, other DEA agents obtained an address from Southern Bell and established surveillance at this residence. On the afternoon of April 11th, Cardona and Mrs. Rivera arrived at the residence driving separate vehicles. Both were arrested in the residence while watching television. A search of the

residence resulted in the seizure of six kilograms of cocaine. A search of Cardona's vehicle resulted in the seizure of a tape dispenser containing tape similar to that used to package the cocaine discovered in the van and the house. There was no contraband of any sort in Mrs. Rivera vehicle. Mrs. Rivera's fingerprints were not on any of the cocaine or packaging seized during the investigation.

Mrs. Rivera presented evidence establishing that she had contacted several persons on the morning of April 11th attempting to make plans with them for the day and that her plans to spend the day with co-defendant Cardona did not develop until late that morning. She was told by Cardona that they had to go to the restaurant to meet one of her friends. She spoke at the restaurant to the man on the telephone at Cardona's request.

Mrs. Rivera testified that she had no idea that a drug deal was being planned, she did not participate in any drug transaction, and she did not know of or have anything to do with the cocaine found in the house in which she was arrested.

## REASONS FOR GRANTING THE WRIT

### I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER.

"The very foundation upon which our due process system of criminal justice rests forbids that an accused in a criminal case be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). "The standard of proof beyond a reasonable doubt . . . "plays a vital role

in the American scheme of criminal procedure" because it operates to give "concrete substance" to the presumption of innocence and to insure against unjust convictions, and to reduce the risk of factual error in a criminal procedure." Jackson v. Virginia, 443 U.S. 307, 315 (1979). The purpose of entering a judgment of acquittal is to enforce this fundamental principle and to insure that no jury may capriciously find an accused guilty though there is no legally sufficient evidence of his guilt. See Jackson at 317 n.10; 2 Wright, Federal Practice and Procedure: Criminal 2d § 461 at 638 (2d ed. 1982).

Quite clearly, in order to sustain a defendant's conviction for possession with intent to distribute cocaine, the government must prove beyond reasonable doubt that the defendant both possessed the cocaine and intended to distribute it.

E.g., United States v. Poole, 878 F.2d 1389, 1391 (11th Cir. 1989). Absent proof of both of these elements, a conviction cannot stand. See United States v. Casey, 835 F.2d 148, 153-54 (7th Cir. 1987). The possession element can be satisfied by proof of actual possession, constructive possession, or aiding and abetting another in possession. United States v. Grier, 866 F.2d 908, 930 (7th Cir. 1989); Poole at 1392; United States v. Manzella, 791 F.2d 1264, 1267 (7th Cir. 1986).

The opinion of the court below sustaining Mrs. Rivera's conviction for possession with intent to distribute cocaine conflicts with decisions of the Fifth and Seventh Circuit Courts of Appeals. Assuming, arguendo, the sufficiency of the evidence to prove Mrs. Rivera's intent to distribute the cocaine

of co-defendants Temino and Cardona,[1] there was utterly no evidence to establish her constructive possession over the cocaine. The government clearly proved (and Mrs. Rivera admitted) her presence at the location where co-defendant Cardona conducted follow-up negotiations with agent Forteza and a residence in which several kilograms of cocaine were found. The evidence also established Mrs. Rivera's association with co-defendants Cardona and Temino who unquestionably were engaged in a

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[1]The only evidence of Mrs. Rivera's intent to distribute cocaine aside from her presence during negotiations for the sale and association with co-defendant Cardona who arranged the sale was the undercover agent's testimony that he elicited from her that she knew the individual who would be supplying the cocaine, that she spoke to him on the telephone, and that she relayed a message from him to the agent concerning arrangements for the proposed transaction. The agent's testimony was wholly uncorroborated. Mrs. Rivera denied the involvement about which the agent testified.

narcotics transaction. However, there was no evidence that Mrs. Rivera exercised any measure of dominion and control over the contraband. There is no evidence that she had any "right or power to control" it. See Manzella, 791 F.2d at 1267. Instead, co-defendant Cardona arranged for the delivery of the cocaine. Co-defendant Temino delivered the cocaine.

Agent Forteza's testimony of Mrs. Rivera's ambiguous statement regarding the packaging of the cocaine that "[t]hat's the way we received the load" does not bridge the gaping hole in the government's proof.[2] This statement does not reasonably indicate that Mrs. Rivera had any custody or control over "the load". Even if it did, the statement fails to indicate that "the load"

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[2]Mrs. Rivera specifically denied having made this statement.

was or included the cocaine that co-defendant Temino ultimately delivered to Forteza. This Court long ago announced that a court may not pile inference upon inference to fill a fatal hole in the goverment's case. Ingram v. United States, 360 U.S. 672, 680 (1959). Thus, notwithstanding the decision below, the evidence was legally insufficient to sustain Mrs. Rivera's conviction on a constructive possession theory.

Although the government could also have satisfied the possession element by proving Mrs. Rivera aided and abetted her co-defendants in possessing the cocaine, e.g., Manzella at 1267, the government also failed to prove that Mrs. Rivera "performed an[y] act which contributed to the execution of [the possession aspect of] the crime . . .." United States v. Russo, 796 F.2d 1443, 1458-59 (11th Cir. 1986).

Certainly Mrs. Rivera's presence at the scene of the follow-up negotiations did not contribute in the least to the possession of the cocaine. Her brief conversation on the telephone during which she parotted the message relayed by co-defendant Cardona did not contribute to the possession of the cocaine. Nothing else she did or said at the place where the follow-up negotiations took place contributed in any way to the possession of the cocaine.[3]

The decision of the Eleventh Circuit Court of Appeals below irreconcilably conflicts with the case of United States v. Gallagher, 565 F.2d 981 (7th Cir. 1977).

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[3]Although, theoretically, Mrs. Rivera could have been convicted on a vicarious liability theory, Pinkerton v. United States, 328 U.S. 640 (1946), the government's failure to request an appropriate instruction renders her conviction for possession with intent to distribute cocaine unsustainable on this basis. See Manzella at 1267-69.

There, the defendant, in partnership with an FBI informant, attempted to obtain stolen securities from a third party for the purpose of selling them to another undercover FBI agent. However, before the sale could be completed, the seller and the defendant were arrested. The government prosecuted the defendant and secured a conviction on the theory that he aided and abetted the seller in his possession of the stolen securities. Noting that "the government's standard for one who aids and abets a crime is overly broad," Id. at 984, the appellate court reversed. The court distinguished several cases relied on by the government because there was no evidence that the defendant before it had participated in acquiring the contraband. The court distinguished another case because the possessory offense had occured without any help from the defendant. Id.

See United States v. Manzella, 791 F.2d 1263 (7th Cir. 1986) (defendant's conviction of possession with intent to distribute cocaine reversed where defendant, who was clearly a broker, was not in constructive possession because he could not assure delivery of the cocaine).

The decision below also irreconcilably conflicts with the decision in United States v. Jackson, 526 F.2d 1236 (5th Cir. 1976). There, the court reversed the defendant's conviction for aiding and abetting another's possession with intent to distribute cocaine. The defendant had introduced two co-defendants who, in turn, arranged to sell cocaine to DEA agents. The defendant never exercised dominion or control over the cocaine but clearly "was associated with the criminal venture, participated in it as in something he wished to bring about, and sought by his

action to make it succeed." Id. at 1273. The government contended the conviction should be upheld based on evidence that the appellant aided and abetted the distribution of the cocaine. Although noting the "superficial appeal" of this argument, the court eschewed it as inconsistent with the underlying rationale of the aiding and abetting statute. Id. at 1238. The court recognized that under an aiding and abetting theory the government need not prove all the elements of the substantive offense. However, on the other hand, the government did need to prove the defendant's participation in both aspects of the underlying offense, i.e., possession and intent to distribute. Although the defendant could have been convicted of aiding and abetting the distribution of cocaine, the government's failure to prove participation in the possession of the cocaine compelled reversal of his

conviction. Cf. United States v. Longoria, 569 F.2d 422 (5th Cir. 1978) (possession with intent to distribute marijuana conviction reversed because, though evidence sufficient regarding possession, evidence insufficient regarding intent to distribute).

The decision of the court below sustaining Mrs. Rivera's conviction for conspiracy to possess with intent to distribute cocaine based simply on evidence of presence, association, and knowledge, also conflicts with decisions of other United States Circuit Courts of Appeals. For instance, in United States v. Cepeda, 768 F.2d 1515 (2nd Cir. 1985), reversed the conviction of a defendant for conspiracy to distribute or possess cocaine where the evidence only established the defendant's possession of a small quantity of cocaine and paraphenalia usable in cutting cocaine.

Although the court acknowledged the compromising nature of the evidence located in the defendant's house, it concluded that based on this meager evidence "it simply cannot be said that a reasonable juror could find Cepeda guilty of conspiracy beyond a reasonable doubt." Id. at 1518. Similarly, in United States v. Soto, 716 F.2d 989 (2nd Cir. 1983), the court reversed the conspiracy to distribute narcotics conviction of a defendant who the government only proved resided at an apartment which she knew was used as a cocaine cutting mill. Although the court acknowledged that the evidence did not have to exclude every conceivable hypothesis of innocence, the government's failure to prove the defendant's specific intent to possess with intent to distribute cocaine required reversal over a conviction. Id. at 993. See United States v. Ramirez, 880

F.2d 236 (9th Cir. 1989).

This Court should review and reverse the decision below in order to reconcile the conflicting case law concerning the evidence necessary to prove constructive possession or aiding and abetting another to possess as well as conspiracy to possess cocaine. These issues are of great, nation-wide importance given the tremendous number of narcotics related convictions reviewed by our federal circuit courts of appeals. The decision below, as well as others filed in recent years, reveals that the Eleventh Circuit Court of Appeals has developed a different approach for analyzing sufficiency of the evidence arguments in narcotics cases placing a far heavier burden on the defendant than in other cases. Compare United States v. Cruz-Valdez, 773 F.2d 1541 (11th Cir. 1985) (en banc), cert. denied sub nom.,

Ariza-Fuentes v. United States, 475 U.S. 1049 (1986) with United States v. Sarro, 742 F.2d 1286 (11th Cir. 1984). The court has substantially veered from the course prescribed by this court in Jackson v. Virginia, 443 U.S. 319 (1979) requiring that an appellate court insure that a "rational trier of fact viewing all of the evidence from a rationale prosecution standpoint could have found guilt beyond a reasonable doubt . . .." Review by this Court is necessary to resolve the conflict between the decision below and the above cited decisions of this Court and other federal circuit courts of appeals and to clarify the law concerning these important issues.

## II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A criminally accused's right to insist that the government prove guilt beyond all reasonable doubt lies at the very core of the due process clause of the fifth amendment to the United States Constitution. An appellate court's duty to protect this right is not mitigated in the least by the fact that a defendant's conviction is based on a jury verdict. A Senior Circuit Judge Irving Goldberg reminded us in United States v. Lonsdale, 577 F.2d 923 (5th Cir. 1978):

> This case summons us to apply the principle that the government must prove a defendant guilty beyond a reasonable doubt. In most instances the jury conscientiously discharges its duty of judging the guilt or innocence of the accused. The parade of convicted defendants

> who pass ceaselessly before this court and whose convictions are justifiably affirmed bears tribute to the judgment of citizens who serve on juries. We are ever mindful of the leavening influence of juries and of there concomittant compassion. But while we salute the wisdom of placing the jury at the heart of the criminal justice system, we must not forget the importance of our role in that system as a reviewing court or become callous in our application of the fundamental principle that the government must prove a defendant guilty beyond a reasonable doubt.

Id. at 925.

Members of this Court have recently expressed grave concern that a dual standard of review has evolved in this country which tolerates the violation of constitutional rights of persons involved with drug trafficking. See, e.g., United States v. Sokolow, ____ U.S. ____, ____, (1989) (Marshall, J., dissenting); Florida v. Riley, ____ U.S. _____, _____, (1989) (Brennan, J., dissenting). However, as

Justice Brennan stated, "[W]e dismiss this as a "drug case" only at the peril of our own liberties." Id. at _____. In the context of the due process cause of the fifth amendment, the court in United States v. Gallagher, 565 F.2d 981 (7th Cir. 1977) stated: "In our zeal, however, to cause a conceded wrongdoer to be convicted, we must guard against vague and broad judicial extensions of [a] statute premised only upon imaginative and recondite theories." Id. at 984.

It appears from the decision below that the Eleventh Circuit Court of Appeals has fallen prey to the national hysteria over narcotics use and trafficking. However, it was the absolute duty of the court to ignore this public pressure and to steadfastly protect Mrs. Rivera's right to due process of law. The court below substantially departed from this accepted

and usual course of judicial proceedings. To correct this gross deviation, this Court must intervene and exercise its supervisory power to reverse Mrs. Rivera's conviction and bestow the protections of the Constitution on her to which she is entitled.

## CONCLUSION

For these reasons, the petitioner respectfully prays that this court grant its writ of certiorari.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by U.S. Mail to: Bruce Udolf, Esquire, Assistant United States Attorney, United States Attorney's Office, 155 South Miami Avenue, Miami, Florida 33130 this ___ day of September, 1989.

WEINER, ROBBINS, TUNKEY & ROSS, P.A.

By: _____
FREDERICK S. ROBBINS

# APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 88-6062
Non-Argument Calendar

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D.C. Docket No. 88-0272

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GLADYS RIVERA SOCORRO,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Florida

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(July 25, 1989)

Before FAY, KRAVITCH, and ANDERSON, Circuit Judges,

PER CURIAM:

Affirmed. See Circuit Rule 36-1.

Judgment entered: July 25, 1989
For the Court: Miguel J. Cortez, Clerk

By: s/s David Maland
Deputy Clerk

ISSUED AS MANDATE: August 18, 1989